

**SOUTHEAST DIVISION
EXPEDITED MINOR SUBDIVISION**

STAFF REPORT FOR THE BOARD OF COUNTY COMMISSIONERS

CASE PLANNER: Shaun Morrell

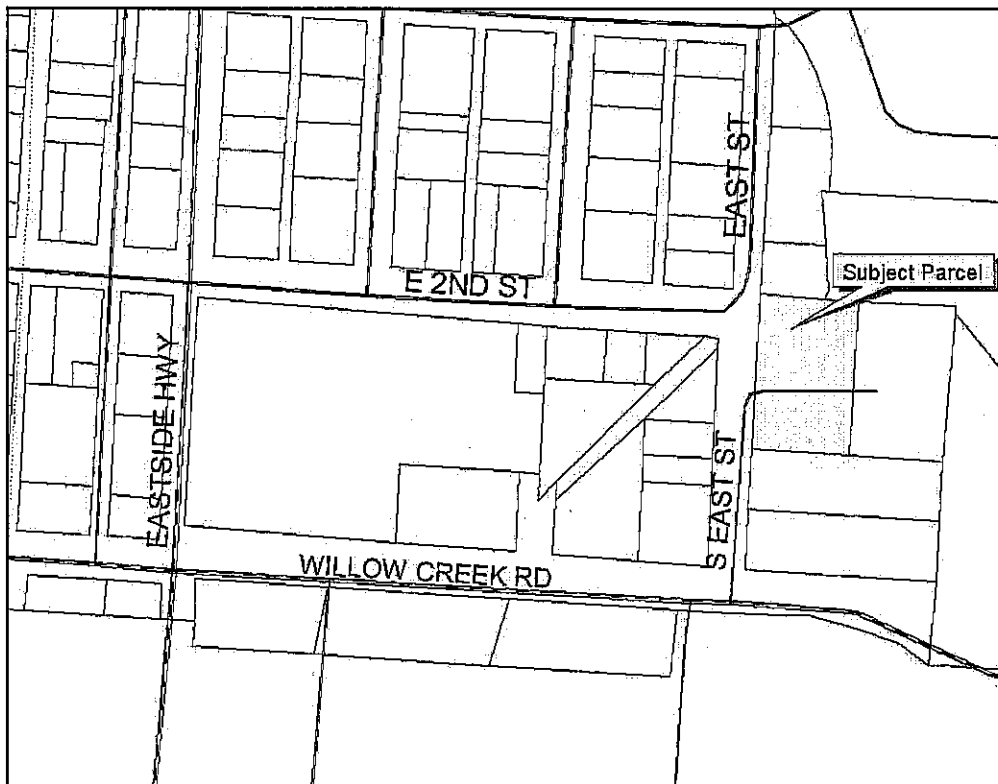
**REVIEWED/
APPROVED BY:** Renee Van Hoven

PUBLIC MEETING: BCC site visit: 3:30 p.m. October 3, 2006
BCC public meeting: 9:00 a.m. October 5, 2006
Deadline for BCC action (35 working days): October 30, 2006

APPLICANT OWNER: K & J Development
843 Peppergrass Lane
Corvallis, MT 59828

REPRESENTATIVE: Bitterroot Engineering
1180 Eastside Highway
Corvallis, MT 59828

LOCATION OF REQUEST: The property is located east of Corvallis on South East Street.



Map 1: Location Map
(Data Source: Ravalli County Planning Department)

**LEGAL DESCRIPTION
OF PROPERTY:**

SW1/4 of Section 33, T7N, R20W, P.M.M., Ravalli County, Montana.

**APPLICATION
INFORMATION:**

The subdivision application was determined complete on September 8, 2006. Agencies were notified of the subdivision proposal. Agency comments received by the Planning Department are included as Exhibits A-1 through A-3 of the staff report.

LEGAL NOTIFICATION:

No legal advertisement is required for an expedited minor subdivision. Notice of the project was posted on the property. Adjacent property owners were notified of the subdivision by certified mail postmarked September 21, 2006. No public comments have been received to date.

**DEVELOPMENT
PATTERN:**

Subject property:	Residential (3 existing units)
North:	Utility
South:	Residential
East:	Residential
West:	Residential and Commercial

RAVALLI COUNTY BOARD OF COMMISSIONERS

OCTOBER 5, 2006

SOUTHEAST DIVISION
TWO-LOT EXPEDITED MINOR SUBDIVISION

RECOMMENDED MOTION

That the Southeast Division expedited minor subdivision be **approved**, based on the findings of fact and conclusions of law in the staff report and subject to the conditions in the staff report.

RECOMMENDED MITIGATING CONDITIONS OF APPROVAL FOR THE SUBDIVISION

1. A document entitled "Notifications to Future Property Owners" that includes the following notifications and the attachments listed below shall be included in the submittal of the final plat to the Planning Department and filed with the final plat:

Notification of Irrigation Ditch Easement. Within this subdivision there is an irrigation easement. All downstream water right holders have the right to maintain and repair their ditches/pipelines and diversion structures whenever necessary to keep them in good condition. The filed subdivision plat shows an irrigation ditch and easement on the property. The downstream water right holders must approve any relocation or alteration (e.g. installation of a culvert) of an irrigation ditch or pipeline. Any act which damages or destroys a ditch, interferes with its operation or maintenance in any way, or restricts access to the ditch so as to interfere with its maintenance, is expressly prohibited. The downstream water right holders have the right to use the easement to maintain the ditch or pipeline. *(Effects on Agricultural Water User Facilities)*

Lots within this subdivision do not currently have the right to take irrigation water out of the Corvallis Canal (Surprise Ditch) located on Lot 1 of the subdivision. Taking water without a water right is illegal. *(Effects on Agricultural Water User Facilities)*

Notification of Common Access Maintenance. The common access in the southwestern portion of Lot 1, as shown on the final plat, is not maintained by Ravalli County, the State of Montana, or any other governmental entity. Neither the County nor the State assume any liability for lacking or improper maintenance. A Common Access Maintenance Agreement was filed with this subdivision and outlines which parties are responsible for maintenance and under what conditions. *(Effects on Local Services)*

Notification of Private Access Easement. A 16-foot-wide private easement, granting access to the adjoining parcel on the east, exists on Lot 1, as shown on the final plat. No structure may encroach upon this easement. The easement shall remain unobstructed and accessible at all times. *(Effects on Local Services)*

Limitation of Access onto County Road. "No-ingress/egress" restrictions are located along the South East Street frontage of the subdivision, and along the private access easement on Lot 1, precluding vehicular access onto these rights-of-way, excepting the approved approaches. All lots within this subdivision must use the approved access points. This limitation of access may be lifted or amended with approval of the County. *(Effects on Local Services and Effects on Public Health and Safety)*

Notification of Severe Soils. The entire subdivision may have soils rated as severe for road construction. The descriptions of the severe soils in question are included as an exhibit to this

document. (The applicant shall include the exhibit as an attachment.) (*Effects on Public Health and Safety*)

2. Protective covenants for this subdivision shall be submitted with the final plat that include the following provisions:

Living with Wildlife. Homeowners must accept the responsibility of living with wildlife, must accept responsibility for protecting their vegetation from damage, and must confine their pets and property store garbage, pet food, and other potential attractants. Homeowners must be aware of potential problems associated with the occasional presence of wildlife such as deer, elk, black bear, mountain lion, coyote, fox, skunk, raccoon and magpie. Please contact the Montana Fish, Wildlife & Parks office in Missoula (3201 Spurgin Road, Missoula, MT 59804) for brochures that can help homeowners "live with wildlife." Alternatively see the Education portion of MFWP's web site at www.fwp.mt.gov.

The following covenants are designed to help minimize problems that homeowners could have with wildlife, as well as helping homeowners protect themselves, their property and the wildlife that Montanans value. (*Effects on Wildlife and Wildlife Habitat*)

- a) Homeowners must be aware of the potential for **vegetation damage by wildlife, particularly from deer** feeding on green lawns, gardens, flowers, ornamental shrubs and trees in this subdivision. Homeowners should be prepared to take the responsibility to plant non-palatable vegetation or protect their vegetation (fencing, netting, repellents) in order to avoid problems. Also, consider landscaping with native vegetation that is less likely to suffer extensive feeding damage by deer.
- b) **Gardens and fruit trees** can attract wildlife such as deer and bears. Keep produce and fruit picked and off the ground, because rotting vegetable material can attract bears and skunks. To help keep wildlife such as deer out of gardens, fences should be 8 feet or taller. Netting over gardens can help deter birds from eating berries.
- c) **Garbage** should be stored in secure bear-resistant containers or indoors to avoid attracting animals such as bears, raccoons, dogs, etc. It is best not to set garbage cans out until the morning of garbage pickup.
- d) **Do not feed wildlife** or offer supplements (such as salt blocks), attractants, or bait for deer or other wildlife. Feeding wildlife results in unnatural concentrations of animals that could lead to overuse of vegetation and disease transmission. Such actions unnecessarily accustom wild animals to human, which can be dangerous for both. It is against state law (MCA 87-3-130) to provide supplemental feed attractants if it results in a "concentration of game animals that may potentially contribute to the transmission of disease or that constitutes a threat to public safety." Also, homeowners must be aware that deer might occasionally attract mountain lions to the area.
- e) **Bird feeders** attract bears. If used, bird feeders should: (i) be suspended a minimum of 20 feet above ground level, (ii) be at least 4 feet from any support poles or points, and (iii) be designed with a catch plate located below the feeder and fixed such that it collects the seed knocked off the feeder by feeding birds.
- f) **Pets** must be confined to the house, in a fenced yard, or in an outdoor kennel area when not under the immediate control of their owner(s), and not be allowed to roam as they can chase and kill big game and small birds and mammals. Under current state law it is illegal for dogs to chase hooved game animals and the owner may also be held guilty (MCA 87-3-124).
- g) **Pet food** must be stored indoors, in closed sheds or in animal-resistant containers in order to avoid attracting wildlife such as bears, mountain lions, skunks, raccoons, etc. **When feeding pets** do not leave food out overnight. Consider feeding pets indoors so that wild animals do not learn to associate food with your home.

- h) **Barbecue grills** should be stored indoors. Permanent, outdoor barbecue grills are discouraged in this subdivision. Keep all portions of the barbecues clean. Food spills and smells on the grill, lid, etc. can attract bears and other wildlife.
- i) Consider **boundary fencing** that is no higher than 3½ feet (at the top rail or wire) and no lower than 18 inches (at the bottom rail or wire) in order to facilitate wildlife movement and help avoid animals such as deer and/or elk becoming entangled in the fence or injuring themselves when trying to jump the fence.
- j) **Compost piles** can attract skunks and bears and should be avoided in this subdivision. If used they should be kept indoors or built to be wildlife-resistant. Compost piles should be limited to grass, leaves, and garden clippings, and piles should be turned regularly. Adding lime can reduce smells and help decomposition. Do not add food scraps. (Kitchen scraps could be composted indoors in a worm box with minimum odor and the finished compost can later be added to garden soil.)

Waiver of Protest to Creation of RSID/SID. Owners and their successors-in-interest waive all rights in perpetuity to protest the creation of a city/rural improvement district for any purpose allowed by law, including, but not limited to, a community water system, a community wastewater treatment system, and improving and/or maintaining the roads that access the subdivision, including related right-of-way, drainage structures, and traffic control signs. *(Effects on Local Services)*

Access Requirements for Lots within this Subdivision. The Corvallis Rural Fire District has adopted the Uniform Fire Code. All accesses, including driveways to residences over 150' in length, must have a minimum unobstructed travel surface width of 20', a vertical clearance of 13'6" and an all-weather surface that can accommodate the weight of a fire truck (approximately 40,000 lbs.) to meet requirements of the Uniform Fire Code. Please contact the Corvallis Rural Fire District for further information on the requirements of the Corvallis Rural Fire District and/or the Uniform Fire Code. *(Effects on Local Services and Effects on Public Health and Safety)*

Primary Heat Source. The primary heat source for the newly constructed residences in this subdivision shall be at least 75% efficient. *(Effects on Natural Environment)*

Control of Noxious Weeds. Lot owners shall control the growth of noxious weeds on their respective lot(s). *(Effects on Natural Environment)*

Lighting for New Construction. Full cut-off lighting shall be required for any new construction within this subdivision. A full cut-off fixture means fixtures, as installed, that are designed or shielded in such a manner that all light rays emitted by the fixture, either directly from the lamps or indirectly from the fixture, are projected below a horizontal plane through the lowest point on the fixture where light emitted. The source of light is fully shielded, top and sides, so as not to emit light upwards or sideways, but only allowing light to shine down towards the subject that is to be lighted. Spotlighting of flag poles shall be permitted. *(Effects on Public Health & Safety)*

Radon Exposure. The owner understands and accepts the potential health risk from radon concentrations, which are presently undetermined at this location. Unacceptable levels of radon can be reduced through building design and abatement techniques incorporated into structures. *(Effects on Public Health and Safety)*

Maintenance of Fencing along the Corvallis Canal (Surprise Ditch). The owners of Lot 1 shall be responsible for maintaining the safety fencing on the northwest portion of the property

to meet the specifications in Section 5-6-2(b) of the Ravalli County Subdivision Regulations. *(Effects on Public Health and Safety)*

Amendment. The covenants filed with the final plat shall state that written governing body approval shall be required for amendments to provisions of the covenants listed above, which are required to be included as a condition of subdivision approval. *(Effects on all six criteria)*

3. The subdividers shall include an RSID/SID waiver in a notarized document filed with the subdivision plat that states the following: Acceptance of a deed for a lot within this subdivision shall constitute the assent of the owners and any successors-in-interest to any future RSID/SID, based on benefit, for a community wastewater system, community water system, or upgrading roads leading to or within the subdivision, including, but not limited to, paving, curbs and gutters, non-motorized transportation facilities, street widening, and drainage facilities. *(Effects on Local Services)*
4. The applicant shall provide evidence that a contribution, in an amount-per-unit to be determined by the Board of County Commissioners in consultation with the applicant and the Corvallis School District, has been paid to the School District prior to final plat approval. *(Effects on Local Services)*
5. The applicant shall provide a letter from the Corvallis Rural Fire District stating that they have provided the required 1,000 gallons per minute water supply or 2,500 gallons per lot water storage for fire protection for each lot within this subdivision. Alternatively, the applicant may provide evidence of a \$500-per-lot contribution made to the Corvallis Rural Fire District with the final plat submittal in lieu of the required water supply or water storage for fire protection. *(Effects on Local Services and Effects on Public Health and Safety)*
6. Prior to final plat approval, the subdivider shall ensure that, for each lot within the subdivision, a County-issued address is posted at the intersection of the driveway with South East Street. *(Effects on Public Health and Safety)*
7. The final plat shall show a no-ingress/egress zone along South East Street, excepting the approaches approved by the Road and Bridge Department, as shown on the preliminary plat. A no-ingress/egress zone shall also be shown along both sides of the private access easement on Lot 1, excepting the common access. *(Effects on Local Services and Effects on Public Health and Safety)*
8. The 60-foot-wide irrigation easement for the Corvallis Canal (Surprise Ditch), as shown on the preliminary plat, shall be shown on the final plat. *(Effects on Agricultural Water User Facilities)*
9. The 16-foot-wide private access easement on Lot 1, as shown on the preliminary plat, shall be shown on the final plat as a private access easement. *(Effects on Local Services)*
10. The approaches to both lots shall be paved from the edge of the paved surface of South East Street a distance of 20 feet, or to the eastern edge of the South East Street right-of-way, whichever is greater; or as required by the Road Department, if specified in the approach permit. *(Effects on Local Services)*
11. Prior to final plat approval, the subdivider shall remove one of the two existing residential structures on Lot 1, as indicated on the preliminary plat. *(Compliance with Ravalli County Subdivision Regulations)*

12. The subdivider shall provide evidence with the final plat submittal that the Corvallis Sewer District has granted final approval for the proposed sewer connection to Lot 1. (*Effects on Local Services*)

INTRODUCTION

Southeast Division is a two-lot expedited minor subdivision proposed on 1.0 acre. The property is located just east of Corvallis on South East Street. It is located in the Corvallis School District and the Corvallis Rural Fire District. There are three existing residences, including two mobile homes on the proposed northern lot. The proposal is to create two (2) residential lots, removing one of the mobile units prior to final plat approval, and replacing the second with a duplex at a later time. Both of the proposed lots would be served by connections to the Corvallis public sewer system and individual water wells. No variances are proposed.

Staff is recommending conditional approval of the subdivision.

SUBDIVISION REPORT

COMPLIANCE WITH PRIMARY SUBDIVISION REVIEW CRITERIA

CRITERION 1: EFFECTS ON AGRICULTURE

Findings of Fact:

1. According to the 1959 and 1972 soils reports published by the U.S. Department of Agriculture, 100% of the subject property may have soil type Hf (Hamilton-Corvallis silt loam), which is recognized by the Natural Resources Conservation Service as Prime Farmland Soil.
2. The property is not currently being used for agriculture, and the subdivision will not result in a change from the existing residential land use.
3. The property is located in a residential neighborhood in the community of Corvallis.

Conclusion of Law:

This subdivision will have no impact on agriculture.

CRITERION 2: EFFECTS ON AGRICULTURAL WATER USER FACILITIES

Findings of Fact:

1. According to the application, the property does not have water rights.
2. The Corvallis Canal (Surprise Ditch) traverses Lot 1 of the proposed subdivision. There is an existing 60-foot wide easement associated with the ditch, as shown on the preliminary plat. To mitigate impacts on agriculture water user facilities, the final plat shall show the irrigation easement. (Condition 8)
3. To notify future property owners and mitigate potential impacts on agricultural water user facilities, a notification of the irrigation ditch and easement shall be filed with the final plat. Notification shall also be included that owners of the lots do not have the right to take water from the irrigation ditch traversing Lot 1. (Condition 1)

Conclusion of Law:

Impacts to agricultural water user facilities will be minimized through the recommended mitigating conditions of final plat approval.

CRITERION 3: EFFECTS ON LOCAL SERVICES

Findings of Fact:

1. Both lots are proposed to be served by South East Street, a County-maintained road. The Road and Bridge Department has confirmed that the road meets current County standards, and that no pro-rata share will be required for this road (Exhibit A-1 and Application).
2. The pro rata share for substandard County-maintained road(s), or portions thereof, that provide access to this subdivision from Eastside Highway shall be paid by the applicant prior to final plat approval, as required by the Subdivision Regulations.
3. The applicant intends to make a voluntary contribution to the Corvallis School District, as expressed in the application. The School District provided general comments on the subdivision and requested a "reasonable per-lot donation" to mitigate impacts on the schools (Exhibit A-2). Condition 4 requires that the contribution be made prior to final plat approval, in an amount per unit to be determined by the Board of County Commissioners.
4. There is a common access on Lot 1 extending back approximately 25 feet from the western boundary of the parcel. This provides access to Lot 1 and to a private access easement for the benefit of the adjoining parcel to the east.
5. A Common Access Maintenance Agreement will be filed with the subdivision for the maintenance of the common approach on Lot 1. A notification of the Common Access Maintenance Agreement shall be included in the Notifications Document. (Condition 1)
6. The preliminary plat shows a proposed no-ingress/egress restriction for vehicular access along the South East Street frontage of the subdivision, excepting the approved approaches for the

proposed lots. To mitigate impacts of this subdivision on the public road system, this limitation of access shall be shown on the final plat for this subdivision. A no-ingress/egress zone shall also be shown along the private access easement along the southern boundary of Lot 1, excepting the common access. (Condition 7)

7. A notification of the no-ingress/egress zones shall be included in the Notifications Document filed with the final plat. (Condition 1)
8. The applicant is required to acquire approach permits for the approaches to both lots. The approaches shall be paved from the edge of the paved surface of South East Street a distance of 20 feet, or to the eastern edge of the South East Street right-of-way, whichever is greater; or as required by the Road Department, if specified in the approach permit. (Condition 10)
9. The proposed lots will acquire water supply from individual wells, and wastewater treatment through the Corvallis Sewer District. To mitigate potential impacts of this subdivision on any potential future public water system, improvements to the public sewer system, and/or improvements to the road system, an RSID/SID waiver will be filed with the subdivision. (Conditions 2 and 3)
10. According to the preliminary plat, there is an existing sewer lateral for Lot 2, and a proposed sewer lateral for Lot 1. The applicant shall provide, with the final plat submittal, evidence that the Corvallis Sewer District has approved of the additional connection. (Condition 12)
11. To mitigate impacts on local services to the adjoining property to the east, the 16-foot-wide private access easement shall be shown on the final plat, as shown on the preliminary plat. A notification of this easement shall be included in the Notifications Document, to be filed with the final plat. (Conditions 1 and 9)
12. Bitterroot Disposal provides service to this site.
13. The subdivision is located within the Corvallis Rural Fire District. The Corvallis Rural Fire District has provided general comments on subdivision proposals, indicating they have adopted a policy that addresses access, posting of addresses, and water supply requirements. In lieu of the water supply requirements, the applicant may provide evidence, prior to final plat approval, that a \$500-per-lot contribution was made to the RFD. With the mitigating conditions of approval, the subdivision will meet the recommendations of the Fire District. (Conditions 5 and 6)
14. Adequate public services are available to the subdivision.
15. The Ravalli County Sheriff's Office provides law enforcement services to this area.

Conclusion of Law:

With the conditions of approval and requirements of final plat approval, impacts of the subdivision on local services will be mitigated.

CRITERION 4: EFFECTS ON THE NATURAL ENVIRONMENT

Findings of Fact:

1. The proposed lots will acquire water supply from individual wells, and wastewater treatment through the Corvallis Sewer District.
2. In an e-mail dated August 24, 2006 (Application), the Environmental Health Department indicated that the proposed subdivision will likely be exempted from review by the Montana Department of Environmental Quality (DEQ). As a requirement of final plat approval, the applicant shall provide evidence that this exemption was granted. In the event that an exemption is not granted, the applicant shall provide a Certificate of Subdivision Plat Approval from DEQ.
3. To mitigate air pollution resulting from home heating emissions, the protective covenants filed with this subdivision shall include a provision stating that the primary heat source for any newly constructed residences must be at least 75% efficient. (Condition 2)
4. An approved noxious weed and vegetation control plan is required to be filed with the final plat. According to MCA 7-22-2152, any person proposing a development that needs state or local approval and that results in the potential for noxious weed infestation within a weed district shall notify the weed board at least 15 days prior to activity. Consequently, 15 days prior to

activities requiring a revegetation plan, such as road construction, the plan shall be submitted to the weed board for approval by the board. To mitigate impacts on the natural environment, a noxious weed control provision shall be included in the protective covenants filed with the final plat for this subdivision. (Condition 2)

Conclusion of Law:

Impacts from this subdivision on the natural environment will be mitigated with the conditions and requirements of final plat approval.

CRITERION 5: EFFECTS ON WILDLIFE AND WILDLIFE HABITAT

Findings of Fact:

1. Montana Fish, Wildlife, and Parks (FWP) recommended that the "Living with Wildlife" covenants be filed with this subdivision (Application). To mitigate any impacts on wildlife and wildlife habitat, the covenants shall include the recommended provisions. (Application) (Condition 2)
2. There are no species of special concern listed in the vicinity of the property, according to *Species and Communities of Special Concern*, published by the Montana Natural Heritage Program, October 10, 1995.

Conclusion of Law:

The proposed subdivision will have no significant impacts on wildlife and wildlife habitat.

CRITERION 6: EFFECTS ON PUBLIC HEALTH AND SAFETY

Findings of Fact:

1. The subdivision will access off of South East Street, which was confirmed by the Road and Bridge Department to meet County standards (Application). Access to this subdivision is adequate for public health and safety.
2. The preliminary plat shows a proposed no-ingress/egress restriction for vehicular access along the South East Street frontage of the subdivision, excepting the approved approaches for the proposed lots. To mitigate impacts of this subdivision on the public road system, this limitation of access shall be shown on the final plat for this subdivision. A no-ingress/egress zone shall also be shown along the private access easement along the southern boundary of Lot 1, excepting the common access. (Condition 7)
3. A notification of the no-ingress/egress zones shall be included in the Notifications Document filed with the final plat. (Condition 1)
4. To mitigate impacts on public health and safety, County-issued addresses shall be posted at the intersection of the driveways and South East Street prior to final plat approval. (Condition 6)
5. The proposed subdivision is located within the Corvallis Rural Fire District. Conditions 5 and 6 address the standard recommendations of the District.
6. The proposed lots will have individual wells, and the Corvallis Sewer District will provide wastewater treatment.
7. The Corvallis Canal (Surprise Ditch) traverses the northwestern corner of Lot 1. A safety fence meeting the specifications of Section 5-6-2(b) of the Ravalli County Subdivision Regulations is required to be installed parallel to the supply ditch and its location approved by the Corvallis Canal and Water Company prior to final plat approval. To further mitigate impacts on public health and safety, a provision shall be included in the covenants, to be filed with the final plat, requiring the owners of Lot 1 to maintain the safety fencing. (Condition 2)
8. The preliminary plat and soils map indicate that the entire subdivision may have soils rated as severe for road construction. To educate property owners and to mitigate potential impacts of this subdivision on public health and safety, staff recommends a notification of the potential for severe soils on the entire property be included in the notifications document filed with the final

- plat. Descriptions of the severe soils in question shall be attached to the notifications document as an exhibit. (Condition 1)
9. To mitigate the impacts of light pollution stemming from new construction, the protective covenants shall include a provision requiring full cut-off lighting, with the exception of flag poles. (Condition 2)
 10. There is a prevalence of radon in the County. To mitigate impacts on public health and safety, the covenants shall include a statement regarding radon exposure. (Condition 2)

Conclusion of Law:

The mitigating conditions and requirements of final plat approval address the impacts on public health and safety.

COMPLIANCE WITH:

1) THE SURVEY REQUIREMENTS PROVIDED FOR IN PART 4 OF M.C.A. 76-3.

Finding of Fact:

The Seal of a Professional Land Surveyor or Engineer is required on all final plats, which states that the subdivision complies with part 4 of M.C.A. 76-3.

Conclusion of Law:

This proposal meets the survey requirements, or conditions have been required to bring the proposal into compliance.

2) THE LOCAL SUBDIVISION REGULATIONS PROVIDED FOR IN PART 5 OF M.C.A. 76-3.

Finding of Fact:

Subdivisions are required to comply with the local subdivision regulations provided for in part 5 of M.C.A. 76-3.

Conclusion of Law:

The developer has submitted a plan which complies with the requirements of local subdivision regulations, or conditions have been required that will bring the plan into compliance.

3) THE LOCAL SUBDIVISION REVIEW PROCEDURE PROVIDED FOR IN THE RAVALLI COUNTY SUBDIVISION REGULATIONS

Findings of Fact:

1. According to Planning Department policy (outlined in a July 23, 2004, memo from Patrick O'Herren [Exhibit A-3]), the presence of multiple dwelling structures on a single tract of land requires subdivision review for lease or rent. This application proposes only one dwelling structure per lot. In order to ensure compliance with the Ravalli County Subdivision Regulations, the subdivider shall remove one of the two existing residential structures from Lot 1, as indicated on the preliminary plat, prior to final plat approval. (Condition 11)
2. Subdivisions are required to comply with the local subdivision review procedure provided for in the Ravalli County Subdivision Regulations.
3. A decision of the governing body rejecting or approving a proposed subdivision may be appealed to the district court within thirty (30) days of such decision. The petition shall specify the grounds upon which the appeal is made. An appeal may be made by the subdivider; a landowner with a property boundary contiguous to the proposed subdivision or a private landowner with property within the unincorporated area of the county that can show a likelihood of material injury to the landowner's property or its value; a first class municipality if the subdivision is within three miles of its limits, a second class municipality if a subdivision is within two miles of its limits, or a third class municipality or town if the subdivision is within one mile of its limits. An aggrieved party means a person who can demonstrate a specific personal

and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision.

Conclusion of Law:

This development proposal has been reviewed within the procedures provided in Chapter 3 of the Ravalli County Subdivision Regulations. With Condition 11, this proposal will have complied with all necessary procedures.

CONSISTENCY WITH EXISTING ZONING AND COVENANTS

Findings of Fact:

1. There is no existing zoning on the property.
2. There are no known covenants or deed restrictions that currently apply to the property.

Conclusions of Law:

1. Zoning does not apply to the property.
2. There are no known covenants or deed restrictions that currently apply to the property.

PROVISION OF EASEMENTS FOR UTILITIES

Finding of Fact:

The proposed subdivision will be served by Northwest Energy and Qwest Telephone. Utility certificates are a requirement of final plat approval.

Conclusion of Law:

Utility services will be available to this subdivision.

PROVISION OF LEGAL AND PHYSICAL ACCESS

Finding of Fact:

Physical and legal access for this subdivision is proposed via South East Street and Willow Creek Road.

Conclusion of Law:

With the conditions of approval and requirements of final plat approval, the proposal meets the requirements for physical and legal access.

EXHIBIT A-1

Shaun Morrell

From: David Ohnstad
Sent: Thursday, September 28, 2006 9:20 AM
To: Shaun Morrell
Subject: RE: Southeast Division

The Centennial Subdivision was/is a major subdivision (?) over twenty one units (?) that would require re-construction of Willow Creek Road to current standards including the replacement of a bridge over an irrigation canal. The project representative proposed to pay a pro-rata assessment on the bridge in lieu of replacement. My last discussion on the matter related to a proposal to pay a pro-rata assessment **and** to construct a pedestrian pathway adjacent to the bridge.

The bridge in question does not meet current design standards; however it is not limited for weight or height. The width and/or other geometric concerns of the bridge are the reason for the non-standard assessment. The roadway design standards and related policy exclude geometric criteria, absent collision or safety issues, from pro-rata assessments.

The subject subdivision only requires pro-rata assessment, not replacement. Given that only geometric issues exist on the bridge it does not require inclusion in the pro-rata assessment.

From: Shaun Morrell
Sent: Wednesday, September 27, 2006 10:30 AM
To: David Ohnstad
Subject: Southeast Division

David,

Sorry to pester you about this, but I should mention that we will be issuing the staff report for the proposed Southeast Division tomorrow.

The issue is whether this subdivision (parcel #115600, off of South East Street in Corvallis) is required to pay pro rata on the Willow Creek Road bridge over the Corvallis Canal/Surprise Ditch. During our review for Centennial Lot 17 AP subdivision, it was confirmed that the bridge does **not** meet County standards. However, in an e-mail to John Lavey dated 6-30-2006, you wrote that there would be no pro rata share required for South East Division.

Since the proposed subdivision accesses Eastside Highway via this bridge, and assuming that the bridge still does not meet County standards, it would follow that Southeast Division is required to pay pro rata on the bridge improvements.

If you have a chance to revisit this subject today or tomorrow, please send me a quick e-mail to confirm or revise your initial comments on this subdivision.

Thanks,

Shaun Morrell
Ravalli County Planning Department
215 S. 4th St., Suite F
Hamilton, MT 59840
(406) 375-6530
smorrell@ravallicounty.mt.gov

9/28/2006

Corvallis School District #1

P.O. Box 700 / 1045 Main
Corvallis, MT 59828

Phone: (406) 961-4211 Fax: (406) 961-5144

RECEIVED

SEP 26 2006

160609-1532
Ravalli County Planning De

Daniel B. Sybrant
Superintendent
961-4211

Trevor Laboski
Principal
High School
961-3201

Jason Wirt
Assistant Principal
High School
961-3201

Tom A. Miller
Principal
Middle School
961-3007

Rich Durgin
Assistant Principal
Middle School
961-3007

Janice Stranahan
Principal
Primary School
961-3261

Virginia Haines
Special Services
Director
961-3201

Russ Hendrickson
Technology
Coordinator
961-3201

Vannesa Bargfrede
Business Manager
District Clerk
961-4211

EXHIBIT A-2

September 25, 2006

Ravalli County Planning Department
215 South 4th Street, Suite F
Hamilton, MT 59840

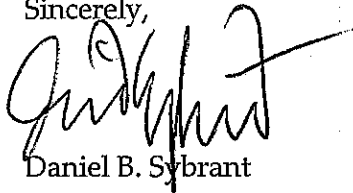
Dear Planning Board,

I have reviewed your letter in regards to the K & J Development for an expedited minor subdivision. The proposal for this subdivision is for 2 lots on 1.0 acres on East Street.

We have no specific objection to this subdivision. As we have stated before, growth in student numbers continues to affect our district infrastructure and bussing system.

In general, we ask that appropriate student safety measures be considered when designing this subdivision. We also ask that you consider a reasonable per lot donation to the school district to help mitigate the impact on our school.

Sincerely,



Daniel B. Sybrant

dbs/lh

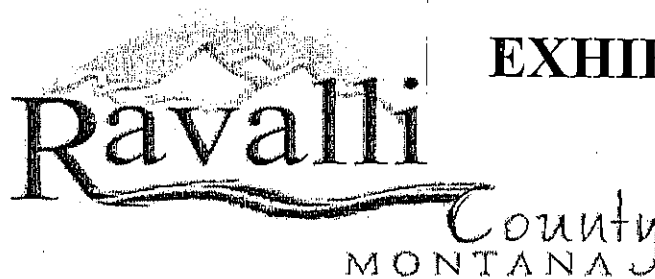


EXHIBIT A-3

PLANNING DEPARTMENT
215 SOUTH 4TH STREET, SUITE F
406.375.6229; 406.375.6336

MEMO
OG-07-809

To: Betty Lund, Chairman, Board of County Commissioners
Cc: James McCubbin, Deputy County Attorney
Theresa Blazicevich, Director, Environmental Health
From: Patrick O'Herren, Planning Director *[Signature]*
Date: 7/23/2004
Re: Subdivisions for lease or rent

As we discussed earlier, there has been considerable debate over the requirements for review of subdivisions for lease or rent. A memo from James McCubbin (attached) helped clarify the issue, and a letter (attached) by former Ravalli County Planning Director Tim Schwecke indicates that interpretation is consistent with past practices.

A letter from the Montana Legislative Services Division (Legal Services Office) addressed to Montana legislator Senator Rick Laible regarding the issue is also attached. In that material, and in an email to Senator Laible, staff attorney Eddy McClure concluded that Ravalli County has correctly interpreted the language and its applicability to second (or further additional) dwelling units or commercial uses on one parcel.

Given past County interpretations, the County Attorney's opinion, and Legislative Services attorney McClure's correspondence, my office has little choice but to enforce the existing regulations. Theresa and I have developed a procedure by which address and multiple waste water treatment permit applications will be coordinated to protect the public's health and safety by meeting existing criteria while not violating state or local subdivision regulations. I expect significant complaints from the public about this issue when permit applications are denied because of subdivision regulations, but believe that our joint efforts will be in the long term best interests of all county residents.

If you have any questions or would like to direct my office to use some other approach, please contact me as soon as possible.

Thank you.

Attachments: three (3)

COPY



RAVALLI COUNTY ATTORNEY

205 Bedford Street, Suite C, Hamilton, MT 59840-2853
Phone (406) 375-6222 Fax (406) 375-6328

Memorandum

TO: Ravalli County Commissioners

CC: Individual Commissioners
Planning Department

FROM: D. James McCubbin, Deputy Attorney *DTM*

DATE: Thursday, May 20, 2004

RE: Subdivisions for Lease or Rent

This memo is written to summarize in writing Montana law relating to subdivisions for lease or rent, as discussed at the Commission meeting held on Tuesday, May 18, 2004.

The Montana Subdivision and Platting Act ("the Act") is set forth in the Montana Code Annotated at Title 76, Chapter 3 (*see* §76-3-101, MCA). For purposes of the Act, the terms "division of land" and "subdivision" are defined in §76-3-103, MCA¹, which provides in relevant part as follows (emphasis added):

76-3-103. Definitions. As used in this chapter, unless the context or subject matter clearly requires otherwise, the following definitions apply:

* * *

(4) "Division of land" means the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract or properly filing a certificate of

¹ Reference was made in the meeting held Tuesday, May 18, 2004, to alternate definitions found at §§76-4-102 and 103, MCA. However, the definitions in those code sections are not applicable to the Subdivision and Platting Act, as each section includes language making clear that they only apply to "this part," i.e. Title 76, Chapter 4 (State Regulation of Subdivisions), Part 1 (Sanitation in Subdivisions).

survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter. The conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land.

* * *

(16) "Subdivision" means a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and further includes a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes.

* * *

Under the plain meaning of these definitions, any alteration of a parcel of land which would enable transfer of possession of a portion of the parcel, including through rental or lease, is legally a "division of land" and a "subdivision." Any such subdivision is subject to review pursuant to the Act, unless it is subject to an exemption from review.²

The Montana Supreme Court has not directly addressed the scope of subdivisions for lease or rent. The Attorney General has addressed the definitions of "division of land" and "subdivision" as including parcels for lease or rent, at 40 Op. Atty. Gen. Mont. No.57 (1984) and 41 Op. Atty. Gen. Mont. No.3 (1985).³

The 1984 AG Opinion directly concluded that development of a parcel of land for rental units constitutes a subdivision. It may be noted that the definitions of "division of land" and "subdivision" analyzed in the 1984 AG Opinion are nearly identical to those present in the current Montana Code Annotated, and the definitions have not changed at all with respect to subdivisions for lease or rent.⁴ The 1984 AG Opinion thoroughly discusses the meaning and application of these terms, as well as some of the policy concerns relating to review of subdivisions for lease or rent. I am attaching the full text of the 1984 AG Opinion for ease of reference.⁵

2 One such exemption discussed at the meeting is the exemption for conveyances of one or more parts of a structure or improvement, set forth at §76-3-204, MCA.

3 The Montana Supreme Court declined to review whether or not the 1984 Attorney General Opinion is correct, in *Lee v. Flathead County*, 217 Mont. 370, 373 (Mont. 1985).

4 The versions of the statutes in place at the time are quoted within the 1984 AG Opinion (copy attached).

5 The portion of the 1984 Opinion discussing the exemption found at §76-3-204, MCA, should be disregarded. The Montana Supreme Court subsequently ruled that "The amendment [of §76-3-204 in 1985] makes it clear that not only is the renting of existing buildings exempt from subdivision review, but so are all new buildings which are to be used as rentals." *Lee v. Flathead County*, 217 Mont. 370, 373 (Mont.1985). The remainder of the AG Opinion remains valid and applicable.

The 1985 AG Opinion reiterated the 1984 holding, finding in part that a second dwelling on a parcel constitutes a "division of land" and thus a "subdivision" where possession of the second dwelling will be taken by a family member.⁶

For the foregoing reasons, it does appear clear that Montana law requires subdivision review for any alteration of a parcel of land which would enable transfer of possession of a portion of the parcel, including through rental or lease, unless it is subject to an exemption from review.

DJM

6 Reference was made at the meeting to the March 2000 edition of *Montana's Subdivision and Surveying Laws and Regulations*, a publication of the Montana Department of Commerce, Community Technical Assistance Program (which program has subsequently been eliminated). The reference was to the statements on page 56 of the publication that all conclusions of the 1985 AG Opinion were "negated" by the 1985 amendment of §76-3-204, MCA. However, this code section provides an exemption from review only for development of multiple parts of the same building or improvement, and does not apply to development of separate buildings for lease, rent, or other conveyance. Accordingly, the statement that the AG Opinion was "negated" is incorrect, with respect to the conclusion relating to construction of separate buildings as being subdivisions.



COPY

RAVALLI COUNTY ATTORNEY

George H. Corn, County Attorney
T. Geoffrey Mahar, Chief Deputy
John Bell, Deputy
Karen Mahar, Deputy
D. James McCubbin, Deputy
William E. Fulbright, Deputy

Ravalli County Courthouse
205 Bedford Street, Suite C
Hamilton, MT 59840
Phone (406) 375-6222
Fax (406) 375-6328

MEMO

TO: Ravalli County Commissioners

FROM: D. James McCubbin *DTM*

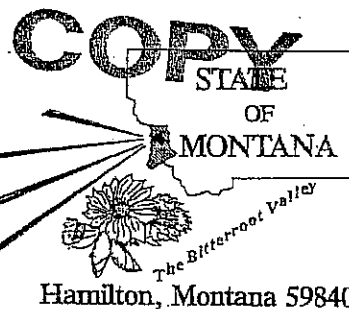
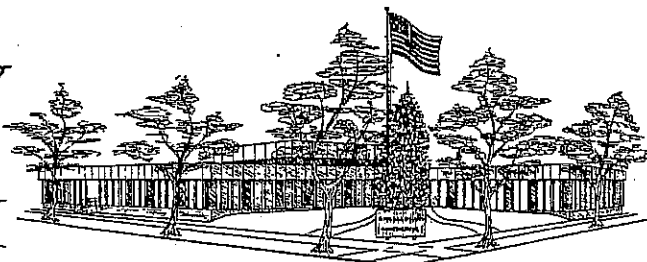
DATE: May 21, 2004

RE: Subdivisions for Lease or Rent

Enclosed for your reference is a copy of a letter from Tim Schwecke to Ed Cummings dated July 20, 1999, regarding the above matter.

Cc: Patrick O'Herren, Planning Director

COUNTY OF RAVALLI



Ravalli County Planning Office
205 Bedford; Courthouse Box 5019
Hamilton, MT 59840
406.375.6229 Fax: 406.375.6336

COPY

Rec'd
7/21/99

July 20, 1999

Mr. Ed Cummings
237 Shearbrook Lane
Stevensville, MT 59870

Subject: Racetrack proposal ✓

Dear Mr. Cummings,

It is my understanding that you have entered into a lease agreement with the Motor Sports Association to lease approximately 50 acres of your property for the proposed racetrack. It is also my understanding that the leased area is part of a 160-acre tract of land. If this is the case, the lease violates the Montana Subdivision and Platting Act. Specifically, the lease constitutes a division of land. Section 76-3-103(3), MCA, specifies that:

"Division of land" means the segregation of one or more parcels of land from a larger tract held in single or undivided ownership **by transferring or contracting to transfer title to or possession of a portion of the tract** or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter. The conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land. (emphasis added)

In addition, this lease constitutes a subdivision which is subject to review under the Act. Section 76-3-103(15), MCA, defines "subdivision" in relevant part as follows:

"Subdivision" means a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed

Under this definition a division of land that creates a parcel containing less than 160 acres that cannot be described as one quarter of a government section is a subdivision. Although section 76-3-208, MCA, exempts subdivisions created by rent or lease from the Act's surveying and filing requirements, it requires them to undergo local subdivision review.

Based on the statutory provisions cited above, it is clear that transferring possession of a 50-acre portion of a larger parcel triggers the application of the Subdivision and Platting Act.

Please contact me at your earliest convenience so that we can discuss this.

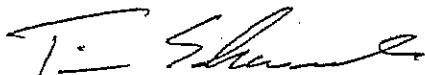
Mr. Cummings

Page 2

July 20, 1999

Sincerely,

RAVALLI COUNTY PLANNING OFFICE



Tim Schwecke, Director

cc: Correspondence File - General

Project File - Violation (Alleged) (VLTN - 99 - 010)

Board of County Commissioners

Mr. George Corn, County Attorney

Mr. Kirk Thompson, 852 Willoughby Lane; Stevensville, MT 59870 (Planning Board Chairman)

LEXSEE 40 OP. ATTY GEN. MONT. NO. 57

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF MONTANA

OPINION No. 57

1984 Mont. AG LEXIS 26; 40 Op. Atty Gen. Mont. No. 57

June 27, 1984

SYLLABUS:

[*1]

SUBDIVISION AND PLATTING ACT - Applicability of subdivision laws to planned apartment building construction project on tract of land owned by developer; MONTANA CODE ANNOTATED - Sections 76-3-102, 76-3-103(3), 76-3-103(15), 76-3-204, 76-3-208, 76-3-601; OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 14 (1981); 39 Op. Att'y Gen. No. 74 (1982).

HELD: A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision," and consequently must be submitted for local review under the Subdivision and Platting Act.

REQUESTBY:

Jim Nugent
Missoula City Attorney
201 West Spruce
Missoula MT 59802-4297

OPINIONBY:

MIKE GREELY, Attorney General

OPINION:

You have requested my opinion on the following question:

Whether a developer's proposal to construct 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer must go through local subdivision review.

Your question arises from the following facts. A corporation has submitted a request for building permits for construction of 48 four-plexes, which will result in 192 dwelling units. The entire tract of land upon which the construction is [*2] planned is owned by the corporation. The tract is less than 20 acres in size, and the corporation has indicated that it will retain ownership of all the four-plexes, as well as the land upon which they are constructed, upon completion of the project. Your question is whether the corporation may proceed with the project without submitting it to local review under the Subdivision and Platting Act (the Act). I conclude that it may not, as the proposed development constitutes a "subdivision" under the Act, and subdivisions must be submitted to the local governing body for review. § 76-3-601, MCA.

Section 76-3-103(15), MCA, provides:

"Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles, or mobile homes.

In 39 Op. Att'y Gen. No. 14 (1981), I construed this section and determined that the following [*3] activities constitute subdivisions:

1. A division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.
2. Any resubdivision.
3. Any condominium.
4. Any area, regardless of size, which provides or will provide multiple space for recreational camping vehicles.
5. Any area, regardless of size, which provides or will provide multiple space for mobile homes.

The proposed construction project in this case clearly will not result in any of the subdivision activities listed in categories 2 through 5 above. Further analysis, however, reveals that it will result in the type of activity described in category 1 above.

Under category 1, regulated subdivision activity results only when there has first been a "division of land . . . which creates one or more parcels containing less than 20 acres." § 76-3-103(15), *MCA*. A "division of land" is defined as:

[t]he segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or [*4] possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter.

§ 76-3-103(3), *MCA*. A division of land thus occurs when one or more "parcels" of land have been segregated from a larger tract held in single or undivided ownership. While the term is not defined in the Act, Black's Law Dictionary generally defines "parcel" as "[a] part or portion of land." This definition appears consistent with the intended meaning of the term in *section 76-3-103(3), MCA*, which states that the segregation of a parcel of land from a larger tract may come about by transferring possession of a portion of the tract. A "parcel" may therefore be thought of as a part or portion of land, or, in the context of the present analysis, as a "portion of the tract."

In the present circumstances, the developer has expressed an intention to construct a number of four-plexes which will be used as rental occupancy buildings. Possession of each individual dwelling unit within the four-plexes will eventually be transferred to tenants. Generally, when a portion of a building is leased, the tenant acquires, [*5] in addition to an interest in the individual dwelling unit, an interest in only that portion of the land necessary to enjoyment of the demised premises. 49 *Am. Jur. 2d Landlord and Tenant* § 195 (1970). At the very least, the tenants in this case will enjoy possession of that portion of the tract, or "parcel," upon which the four-plex which contains their dwelling unit is constructed. The end result of this construction project will therefore be a "division of land," as a number of parcels will be

segregated from the larger tract by means of transference of possession of those parcels to the tenants occupying the four-plexes.

I am aware of the exemption contained in *section 76-3-204, MCA*, which provides:

Exemption for conveyances of one or more parts of a structure or improvement. The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

In 39 Op. Att'y Gen. No. 74 (1982), in considering the exemption provided by this statute, I stated:

The word "situated" indicates [*6] that the Legislature was referring to an existing building, built and utilized prior to the time the division occurs. This would be the situation where a developer converts an existing apartment or office building used for rental purposes to condominiums. [Emphasis added.]

In view of my prior construction of this statute, which I adhere to, I conclude that the exemption provided by *section 76-3-204, MCA*, would not apply to the initial rental or lease of portions of the four-plexes in the instant case. This construction project will not result in the rental or lease of portions of buildings "situated" on one or more parcels of land, because these will not be "existing building[s], built and utilized prior to the time the division occurs." (Emphasis supplied.) The exemption provided by *section 76-3-204, MCA*, does not apply to this construction project since it will result in a "division of land."

A division of land that "creates one or more parcels containing less than 20 acres . . . in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed" is a "subdivision." § 76-3-103(15), *MCA*. The division of land in the instant case will create at [*7] least 48 parcels, in order that possession of the parcels may be rented, leased, or conveyed to individual tenants, or groups of tenants. Therefore, it constitutes a subdivision, and must be submitted to the governing body for local review.

I have applied a liberal construction of the statutes, but I believe this is consonant with the expressed purposes of the Act as articulated by the Legislature and the Montana Supreme Court. *Section 76-3-102, MCA*, provides:

It is the purpose of this chapter to promote the public health, safety, and general welfare by regulating the subdivision of land; to prevent overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; to require development in harmony with the natural environment; to require that whenever necessary, the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body; and to require uniform monumentation of land subdivisions and transferring interests in real property by reference to plat or certificate of survey. [*8]

Commenting on this legislative statement expressing the objectives of the Act, the Supreme Court, in *State ex rel. Florence-Carlton School District v. Board of County Commissioners of Ravalli County*, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978), noted:

Legislation enacted for the promotion of public health, safety, and general welfare, is entitled to "liberal construction with a view towards the accomplishment of its highly beneficent objectives."

A housing development such as the one proposed in this case will inevitably result in various social and economic impacts on the community. I find that this is the precise type of development which the Legislature intended should be submitted for local review under the Act.

Further support for the construction that I have applied is found in the express language of the Act itself. The definition of "division of land" in *section 76-3-103(3), MCA*, includes the segregation of parcels through the transference of either title to or possession of a portion of the tract. Similarly, in *section 76-3-103(15), MCA*, the definition of "subdivision" speaks in terms of sale, rental, lease, or other conveyance of parcels. When construing a statute, [*9] effect must be given to every word, phrase, clause, or sentence therein, and none shall be held meaningless if it is possible to give effect to it. *Fletcher v. Paige*, 124 Mont. 114, 220 P.2d 484 (1950); *Campbell v. City of Helena*, 92 Mont. 366, 16 P.2d 1 (1932). The use of these terms in the definitional sections of the Act reveals that the Legislature anticipated the creation of subdivisions by methods other than the outright sale of parcels of land, and intended that such subdivisions must similarly be submitted for local review. See also § 76-3-208, *MCA*.

THEREFORE, IT IS MY OPINION:

A developer's construction of 48 four-plexes, to be used as rental occupancy buildings, on a tract of land owned by the developer is a "subdivision," and consequently must be submitted for local review under the Subdivision and Platting Act.



Montana Legislative Services Division

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Legal Services Office

July 6, 2004

Senator Rick Laible
529 Moose Hollow
Victor, MT 59875

Dear Senator Laible:

This letter is in response to your request to Greg Petesch on May 20, 2004, for an analysis of the definition of the term "subdivision" in the Montana Subdivision and Platting Act, Title 76, chapter 3, Montana Code Annotated, and in particular the dispute in Ravalli County concerning application of the term to the conveyance of title or possession through sale, rent, or lease. You also asked whether it was the original intent of the Montana Legislature to use the subdivision review process as a zoning tool. Answering your questions requires that I first chronicle the evolution of several provisions of the Montana Subdivision and Platting Act (hereinafter Subdivision Act) and the interpretation of those provisions by either the Montana Supreme Court or the Attorney General.

First, as originally enacted by Chapter 500 in 1973, the term "subdivision", codified as part of section 11-3861, Revised Codes of Montana (R.C.M.), was defined as follows:

"Subdivision" means a division of land, or land so divided, into two (2) or more parcels, whether contiguous or not, any of which is ten (10) acres or less, exclusive of public roadways, in size, without regard to the method of description thereof, in order that the *title or possession of the parcels or any interest therein may be sold, rented, leased, or otherwise conveyed either immediately or in the future*, and shall include any resubdivision of land; and shall further include any condominium or areas providing multiple space for camping trailers, house trailers or mobile homes; provided further that a division of land is a subdivision when the division creates a second or any subsequent parcel for the purpose of sale, rent, lease, or other conveyance from a tract of land held in single or undivided ownership on July 1, 1973, where any of the parcels segregated from the original tract is ten (10) acres or less, exclusive of public roadways, in size, without regard to the method of description thereof. The plat of a subdivision so created shall show all of the parcels segregated from the original tract whether

contiguous or not. "Subdivision" shall include any condominium or areas providing multiple space for camping trailers, house trailers, or mobile homes, regardless of the size of the parcel of land upon which the same is situated. (emphasis added)

When first enacted in 1973, the Subdivision Act contained no separate definition of "division of land".

In 1974, the Legislature amended section 11-3861, R.C.M. (Chapter 334, L. 1974), to redefine "subdivision" as follows:

"Subdivision" means *a division of land*, or land so divided, which creates more one or more parcels containing less than twenty (20) acres, exclusive of public roadways, in order that *the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed*, and shall include any resubdivision; and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles, or mobile homes. A subdivision shall comprise only those parcels less than twenty (20) acres which have been segregated from the original tract, and the plat thereof shall show all such parcels whether contiguous or not. Provided, however, condominiums constructed on land divided in compliance with this chapter are exempt from the provisions of this chapter. (emphasis added).

Chapter 334 also moved language that was originally part of the definition of "subdivision" into a separate definition of "division of land" which provided:

"Division of land" means the segregation of one or more parcels of land from a larger tract held in single or undivided ownership *by transferring, or contracting to transfer, title to or possession of a portion of the tract* or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this act. Provided that where required by this act the land upon which an improvement is situated has been subdivided in compliance with this act, the sale, rent, lease or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land and is not subject to the terms of this act. (emphasis added).

In 1979, the Legislature enacted Senate Bill No. 1, which recodified the Revised Codes of Montana as the Montana Code Annotated. Under that recodification, the section of code containing the definitions of "subdivision" and "division of land" originally found in section 11-3861 was renumbered as 76-3-103, MCA. All the exemptions originally included as part of section 11-3861 or 11-3862 in 1973 were split apart and recodified individually as 76-3-104, 76-

3-201 through 76-3-205, 76-3-207 through 76-3-210, and 76-3-302, MCA.

No substantive changes were made in the definition of "subdivision" until 1993 when the Legislature increased the acreage amount from "parcels containing less than 20 acres" to "parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section". The only amendment to the definition of "division of land" since 1974 occurred in 1997 when the Legislature inserted the second sentence providing that "[t]he conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land".

As currently codified, section 76-3-103, MCA, defines "division of land" and "subdivision" as follows:

(4) "Division of land" means *the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract* or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter. The conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land.

(16) "Subdivision" means *a division of land* or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, *in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed* and includes any resubdivision and further includes a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes.

Therefore, the definition of subdivision has *always* included language concerning land divided in order that the "title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed...". In the context of renting or leasing real estate, it is a well established principle that a tenant not only takes possession of the individual dwelling unit, but also acquires an interest in that portion of the parcel upon which the dwelling unit is constructed. 49 Am. Jur. 2d Landlord and Tenant 19 (1995).

In addition to the plain meaning of the statute, the Attorney General has on several occasions determined that the terms "division of land" and "subdivision" apply to parcels that may be leased or rented, and that the lease or rental also constitutes a transfer of "possession" of the portion of the tract of land. See 40 Op. Att'y Gen. No. 57 (1984); 41 Op. Att'y Gen. No. 3 (1985); and 45 Op. Att'y Gen. 12 (1993). As a result, unless specifically exempted from review, subdivision review applies to any division of land in which the title to the land is transferred or when "possession" of the parcel is transferred through lease or rental.

Under the Montana Subdivision and Platting Act, the specific exemptions from subdivision

review were originally part of the definition of "subdivision", but have been split apart and are now codified in Title 76, chapter 3, part 2, MCA. Included as one of the exemptions is section 76-3-204, MCA, which *in 1981* provided:

Exemption for conveyances of one or more parts of a structure or improvement. The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement *situated on one or more parcels of land* is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter. (Emphasis added.)

In interpreting this exemption in a 1981 opinion, the Attorney General rejected an argument that a condominium was a "division of land" under 76-3-204, MCA, and therefore exempt from review under section 76-4-125, MCA, a provision of the Sanitation Act. (See 39 Op. Att'y Gen. No. 28 (1981).) The Attorney General noted that the Legislature had provided a specific exemption for condominiums in section 76-3-203, MCA. In 1982, the Attorney General was asked whether section 76-3-204, MCA, exempted conversion of "existing" rental occupancy apartment houses or office buildings to individual condominium ownership. In that opinion, the Attorney General construed the phrase "situated on one or more parcels of land" to mean that the Legislature was referring to an *existing* building that was built and utilized prior to the division of land. As a result, the Attorney General concluded that the conversion to condominiums of an *existing* apartment or office building that were to be used for rental purposes was exempt from review. In 1984, the Attorney General was asked to determine whether the construction of 48 four-plexes to be used as rental occupancy buildings was exempt from the Montana Subdivision and Platting Act. Applying 76-3-204, MCA, the Attorney General concluded that an exemption did not apply because the building were not *existing* buildings that were built and utilized prior to the time of division. (See 40 Op. Att'y Gen. No. 57 (1984).)

In direct response to these Attorney General opinions, the 1985 Legislature enacted Senate Bill No. 354 (Ch. 500, L. 1985), which amended section 76-3-204, MCA, to substitute the phrase "*whether existing or proposed*" for "*situated on one or more parcels of land*". In proposing the legislation, Senator Mazurek stated:

Those [Attorney General] opinions...stated that under the subdivision and platting act, a duplex is a subdivision and must be reviewed. The bill simply states that a multi-family structure is not a subdivision and should not be review as such. (45 Op. Att'y Gen. No. 12 (1993) quoting from the 1985 House Committee on Natural Resources minutes, March 22, 1985, at 4.)

The amendment to section 76-3-204, MCA, was discussed in a 1993 Attorney General Opinion concerning the applicability of the Subdivision and Platting Act to the construction of eight condominiums. (See 45 Op. Att'y Gen. No. 12 (1993). Proponents of Senate Bill No. 354 were concerned particularly with the 1984 Attorney General opinion that concluded that the

construction of rental units constituted a "subdivision" and were therefore subject to review. But rather than amend the definition of "subdivision", the Legislature opted to amend section 76-3-204, MCA, to substitute "whether existed or proposed" for "situated on one or more parcels of land". The Attorney General determined that this amendment created an exemption for new construction of rental occupancy units that had not been available under the 1981 version of 76-3-204, MCA, when interpreted by the Attorney General in 1984. It should be noted that in August of 1985, the Montana Supreme Court subsequently clarified that the amendment substituting "whether existing or proposed" for "situated on one or more parcels of land" not only provided an exemption for the renting of *existing* buildings, but for all *new buildings* which were to be used as rentals. See *Lee v. Flathead Co.*, 217 M 370, 373, 704 P.2d 1060, 1063 (1985). The Attorney General also concluded in the 1993 opinion that it was "apparent from the language of the statute and its history that the Legislature intended to change the state of the law with respect to rental occupancy buildings *only*".

While the 1993 opinion cited testimony from the hearing on Senate Bill No. 354, it failed to include an exchange between Senator Mazurek and Representative Raney when the floor was opened to Committee questions. Representative Raney asked Senator Mazurek "if the allowance for improvements to a structure could become a loophole[?]. For instance could an improvement under SB 354 be *a separate structure*[?]." Senator Mazurek replied that *a shed* might be construed as an improvement, but that *a separate residence would not be allowable under law* [under the exemption]. (emphasis added). Rep. Raney replied that he believed there still might be a potential loophole in the bill. (See 1985 House Committee on Natural Resources minutes, March 22, 1985, at 5.

Traditionally, if the plain meaning of a statute is not ambiguous, the court never looks to Legislative history to construe a statute. One can argue that under the plain meaning of 76-3-204, MCA, the phrase "conveyance of one or more parts of a *building, structure, or other improvement, whether existing or proposed*" appears to allow a broader application of the exemption beyond "multi-family" dwellings. Without reviewing the Committee minutes, it is not clear that Senator Mazurek's substitution of "whether existing or proposed" clearly amended the statute to achieve his intent that the exemption *only* applied to a building, structure, or other improvement transformed from a single-family residence into a multi-family structure. However, because the 1993 Attorney General Opinion included the "multi-family dwelling only" conclusion, that interpretation has the force of law. I doubt, however, that the average person would know that the language of section 76-3-204, MCA, must be read in conjunction with the 1993 Attorney General opinion.

If Senator Mazurek's intent was to limit from subdivision review only the sale, rent, lease, or conveyance of one or more parts of a building, structure, or improvement that would result in a "multi-family structure", it is my opinion that the 1985 amendment to section 76-3-204, MCA, did not make that clear in the statute's language. If a separate shed, as conceded by Senator Mazurek, might be an "improvement" exempt from review, what other types of improvements or

structures might arguably also be exempt? As pointed out by Representative Raney in 1985, and as seen in the arguments over "sheds" vs. "septic tanks" recently in Ravalli County, the issue of what types of improvements or structures are subject to subdivision review and which types fall within the exemption is still confusing and subject to various interpretations.

In closing, let me respond to your inquiry as to whether it was the intent of the Legislature to use the subdivision review process as a zoning tool. As far back as 1929, the Legislature recognized the concept of "local control" by enacting planning and zoning statutes, codified in Title 76, chapter 2, which authorized counties and municipalities to implement zoning as one tool to plan for future growth and all the competing commercial and residential interests associated with that growth. Adoption of zoning regulations allows the local governments to determine what parts within their jurisdiction would be zoned and restricted for residential, commercial, or agricultural use or whether an area would contain a mix. When the Legislature enacted the Subdivision and Platting Act, codified at Title 76, chapter 3, MCA, in 1973, that Act was more focused on regulating the overcrowding and public health and safety issues caused by the division of land for residential purposes.

Had the Legislature intended local governments to use the Subdivision and Platting Act as a method of zoning, it could have repealed the Planning and Zoning provisions when it enacted the Montana Subdivision and Platting Act in 1973. The fact that both exist side by side in the Montana Code tells you that the Legislature intended to provide local governments with more than one method for planning for the impacts of future growth and the competition for a shrinking land base from a variety of competing interests.

However, because zoning is difficult and seemingly always controversial, many local governments don't even attempt to use the planning and zoning authority granted by the Legislature in Title 76, chapter 2, MCA. As a result, when a subdivision of residential homes is approved under Title 76, chapter 3, MCA, one can argue that by "getting there first", the residents of the subdivision can "zone out" or prevent the construction of any commercial venture, or at least have a loud voice in controlling what types of commercial businesses are located within or around the subdivision. The end result is a form of "zoning", but not as intended by the Legislature.

If you have questions, please do not hesitate to contact me. For your convenience, I have enclosed a copy of the minutes from the 1985 House Natural Resources Committee.

Sincerely,

Eddye McClure
Staff Attorney
Montana Legislative Services

